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MICHAEL ROD

NO. 80-238

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

DENNIS JAMES BARTLETT,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

QUESTIONS PRESENTED

1. Whether petitioner had standing to question validity of consent search of neighbor's garage.

2. Whether petitioner's confession was admissible where Miranda rights were given on two occasions and statement was completed after attorney arrived and was signed on advice of counsel.

3. Whether the question of petitioner being denied due process in probationary hearing is within the jurisdiction of the Supreme Court where this issue was not properly presented to the highest court of the State and was not reviewed.

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OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals in Case 6 Division 80, not yet reported, appears in petitioner's Appendix with the denial of certiorari by the Alabama Supreme Court.

On March 18, 1980, the Alabama Court of Criminal Appeals affirmed petitioner's probation revocation hearing in Case 6 Division 7 without opinion.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1257 (3), and has presented issues from two separate cases. It is respondent's position that this Court is without jurisdiction to consider issue number three pertaining to probation revocation since this issue was never properly presented to the highest court of the State and was not expressly passed on by the Alabama Supreme Court.

STATEMENT OF THE CASE

(6 Division 80)

Respondent adopts the Statement of the Case as set forth in the Opinion of

the Alabama Court of Criminal Appeals with the addition of:

After Deputy Spradlin was refused permission to search petitioner's side of the garage by his wife, the following questions were asked Deputy Spradlin by the District Attorney: (TR-72).

"Q. All right, after you talked to Mrs. Bartlett, what did you do at that time?

A. I went next door to the Holder residence.

Q. What did you do there?

A. I explained to Mrs. Holder we had suspicion to believe that there was stolen property in the garage, I asked her if I could have consent to look at her side.

Q. Did she in fact, give you consent?

A. Yes, she signed the consent to

search her side of the garage."

Deputy Spradlin was never questioned about any peeping through a hole under the garage door. Defense witness Lynn Holder testified that she was looking out of her window before Deputy Spradlin contacted her and observed the following: (TR. 139-140).

"QUESTION (BY MR. CHAMBLEE):

Q. Where was deputy Spradlin when you specifically saw him about the garage, what was he doing?

A. Well, he was looking around the garage and then he looked through the peepholes, he bent down on my side and looked under the garage."

(Emphasis respondent's).

When the defendant Dennis Bartlett arrived at his home, Deputy Spradlin read him his rights from a Miranda card (TR. 169). After the stolen property was

recovered Bartlett was taken to the county jail where his Miranda rights were again read to him (TR. 173).

No threats or promises or hope of reward was made to Bartlett (TR. 178). Bartlett stated that he wanted an attorney and his attorney was called immediately. While awaiting the arrival of Attorney Wayne Fuller, Deputy Spradlin talked to the defendant who agreed to give a statement. Mr. Fuller arrived before Bartlett's statement was completed (TR. 178) and carried the statement into a private room where he had a conference with Bartlett for about ten minutes (TR. 179).

When Bartlett and his attorney returned from their conference, Mr. Fuller gave Deputy Spradlin permission to complete the statement (TR. 179). The defendant then read the statement

and signed it in the presence of his attorney and upon advice of counsel (TR. 179).

The time span from Bartlett's arrival upon the scene until his confession was given was about thirty minutes (TR. 83).

STATEMENT OF THE CASE

(6 Division 7)

On September 23, 1977, Dennis James Bartlett was placed on probation for a period of five years in three grand larceny cases (TR. 2).

On January 10, 1979, he was arrested on charges of grand larceny which was prosecuted as case 6 Division 80. On February 15, 1979, the probation officer served notice of the probation revocation hearing which defense counsel received (TR. 2-3).

On February 20, 1979, a full judicial

hearing was held in the Circuit Court of Cullman County, Alabama. The State presented evidence that Bartlett had stolen an acetylene welder set. The defendant, represented by his retained counsel, had every opportunity to cross-examine witnesses and to present evidence in his own behalf (TR. 3-19).

At the conclusion of the hearing the trial court stated in open court: (TR. 19).

> "Let the record show after the hearing on the testimony on revocation the Court holds that the defendant stole the acetylene welder while on probation, his probation is revoked and he will serve his sentence."

On March 18, 1980, the Alabama Court of Criminal Appeals affirmed Bartlett's probation revocation without an opinion. In

the application for rehearing on April 1, 1980, petitioner failed to invoke Rule 39 (k) of the Alabama Rules of Appellate Procedure, and in a "no opinion" affirmance there was nothing for the Supreme Court to review.

On June 20, 1980, (Case 79-577) the Supreme Court of Alabama denied Bartlett's petition for certiorari without opinion.

REASONS FOR DENIAL OF THE WRIT

1. PETITIONER HAS NO STANDING TO QUESTION VALIDITY OF CONSENT SEARCH OF NEIGHBOR'S GARAGE.

Petitioner contends that a peeping through a crack under the garage door prior to obtaining the consent of Mrs. Holder to search her side of the garage resulted in an illegal search.

The decision of the Alabama Court of Criminal Appeals addressed this very sub-

ject by stating: (Petitioner's Appendix, 5a).

> "If there were any real conflict between the testimony of Officer Spradlin and the other witnesses as to any peeping or peering into the garage, the trial court had the authority to accept the testimony of Officer Spradlin on the subject. If, on the other hand, the trial court was of the view that there was some peering or peeping by Officer Spradlin, it was justified in concluding that the same was immaterial, in that it occurred as to that part of the garage as to which defendant had no standing to complain."

Petitioner seeks a review of the evidence or the inferences drawn from it. The U. S. Supreme Court will not grant a writ of certiorari in such instances. General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938).

The witness for the defense, Mrs. Holder, testified that prior to the time she gave her consent to have her side of the garage searched she observed Deputy Spradlin on one occasion peep through the crack and stoop down and look under the garage door (TR. 140). She described the peeping by stating, "he bent down on my side and looked under the garage" (TR. 139).

If any peeping occurred it was on the property of Mrs. Holder and the petitioner has no standing to object. A person who is aggrieved by the introduc-

tion of damaging evidence secured by a search of a third person's premises or property does not have any of his Fourth Amendment rights infringed. Rakas v. Illinois, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978).

The neighbor, Mrs. Holder, a third party, voluntarily gave proper consent to have her side of the garage searched. A search of property, without a warrant and without probable cause, but with proper consent voluntarily given is valid under the Fourth Amendment. United States v. Matlock, 415 U. S. 164, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974).

2. PETITIONER'S CONFESSION WAS ADMISSIBLE WHERE MIRANDA RIGHTS WERE GIVEN ON TWO OCCASIONS AND STATEMENT WAS COMPLETED AFTER ATTORNEY ARRIVED AND WAS SIGNED ON ADVISE OF COUNSEL.

When the defendant Dennis Bartlett arrived at his home, Deputy Spradlin read

him his rights in compliance with Miranda v. Arizona, 348 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) (TR. 169). After the stolen property was recovered Bartlett was taken to the county jail where his Miranda rights were again read to him (TR. 173).

Bartlett stated he wanted an attorney and Mr. Fuller was immediately called. Attorney Fuller was not in his office and a second and third call was made shortly thereafter. While awaiting arrival of the attorney, Deputy Spradlin talked to the defendant, who agreed to give a statement. Mr. Fuller arrived before the statement was completed (TR. 178). Mr. Fuller carried the statement into a private room and conferred with his client for about ten minutes (TR. 179).

When Bartlett and his attorney returned from their conference, Mr. Fuller

gave Deputy Spradlin permission to complete the statement (TR. 179). The defendant then read the statement and signed it in the presence of his attorney and upon advice of counsel (TR. 179).

In the voir dire hearing, before the trial judge determined that the confession was voluntarily made he considered both the characteristics of the accused and the details of the interrogation (TR. 82-88). He considered such factors as: (1) The defendant was 22 years old and married (TR. 83). (2) That he had previous experience as a law violator (TR. 84). (3) That the defendant affirmatively stated he understood what his rights were (TR. 75-76). (4) That no threats or promises were made (TR. 85). (5) That the total time span was only 30 minutes during which the defendant was advised of his rights not once but <u>twice</u> (TR. 83). (6) That the defendant's attorney arrived

before the statement was completed, conferred with his client in private, and studied the statement (TR. 87). (7) That the statement was completed in the presence of counsel and was signed upon advice of counsel (TR. 87).

When the totality of circumstances are considered, it is clearly evident the statement was voluntarily given and was admissible as evidence. Schneckloth v. Bustamonte, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).

3. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW ISSUE WHICH WAS NOT PROPERLY PRESENTED AND REVIEWED BY STATE'S HIGHEST COURT.

On March 18, 1980, the Alabama Court of Criminal Appeals affirmed Bartlett's probation revocation in Case 6 Division 7 without opinion. The scope of review of the Supreme Court of Alabama is ordinarily limited to the

facts stated in the opinion of the Court of Criminal Appeals. Rule 39 (k), Alabama Rules of Appellate Procedure.

On April 1, 1980, petitioner failed to follow correct procedural law in a "no opinion" affirmance and failed to invoke Rule 39 (k) in his application for a rehearing before the Court of Criminal Appeals.

The Alabama Supreme Court has held that in the absence of a petitioner invoking Rule 39 (k) ARAP in a "no opinion" affirmance the petition is due to be stricken and the writ will be denied. See: Adam v. State, 362 So. 2d 654 (1978) and Deerman v. State, 370 So. 2d 1107 (1979).

The Federal question (due process in the probation revocation hearing) was not expressly passed on by the highest state court, due to a failure to conform to

State procedure.

A similar jurisdictional question was raised in Street v. New York, 394 U. S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), where it was held that if the question is not presented to the State courts in such a manner that it is decided by the highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

In Michigan v. Tyler, 436 U. S. 499, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978) the Supreme Court held that the failure of a litigant to follow proper procedure resulting in the refusal of a State Court to consider a question, constitutes adequate grounds for barring review in the U. S. Supreme Court so long as the State has a legitimate interest in enforcing its procedural rule.

In this instant case there was nothing before the Alabama Supreme Court for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Charles A. Graddick

/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

Thomas R. Allison

/s/ Thomas R. Allison
THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of October, 1980, I served three copies of the foregoing Brief and Argument in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Alabama on each attorney for petitioner by placing same in the United States mail, postage prepaid and properly addressed as follows:

Arthur J. Haynes
933 Frank Nelson Building
Birmingham, Alabama 35203

Carl E. Chamblee
1300 North 19th Street
Birmingham, Alabama 35234

Thomas R. Allison

/s/ Thomas R. Allison
THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
OF ALABAMA
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150